No. 3705

IN THE

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

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ALASKA PACKERS ASSOCIATION (a Corporation),

Plaintiff in Error,

vs.

D. J. GOVER,

Defendant in Error.

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## BRIEF FOR DEFENDANT IN ERROR.

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## TABLE OF CASES AND AUTHORITIES CITED.

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**Brief for Defendant in Error.**

## I.

## STATEMENT OF FACTS.

In this brief I shall adopt the term "plaintiff" and "defendant" as used in the brief of appellant.

This case comes to this court upon a writ of error to the United States District Court of the District of Alaska, Division Number One, directed to a judgment entered in favor of the plaintiff in the sum of ten thousand dollars.

This action is one for personal injuries claimed to have been sustained by plaintiff under the following circumstances: The defendant, which is a cor-

poration engaged in the business of canning salmon and marketing its product, maintains a hatchery for the propagation of salmon located about 7 or 8 miles from Loring in Southern Alaska. The plaintiff in July, 1919, was employed by defendant to work at this hatchery, and he commenced work there on July 6th as a common laborer in and about the hatchery. His work was to cut wood and do general all-around work. On April 19, 1920, and in the forenoon of that day, plaintiff was engaged in building a fence at the hatchery, and in the afternoon he was directed by Patching, the hatchery superintendent, to get some boards down from an old flume, which boards were to be used in building the fence. The flume had been constructed for the purpose of conducting water to run a sawmill located at the hatchery. The mill had been operated since plaintiff started to work for defendant (pp. 46–47). The top of the flume was a little more than twenty-five feet from the ground and was reached by a vertical ladder. The ladder was constructed of native Alaska spruce, the uprights were 2x6, the rungs or steps were 1x4 and were twenty-four inches long (p. 95). Each rung was fastened to the uprights with three spikes at each end, and the top rung of the ladder was twenty-five feet from the ground. The rungs were also mortised into the uprights. This ladder had been constructed eight or nine years prior to April 19, 1920. It was a perpendicular ladder nailed to the building solidly, and therefore a stationary ladder, and used for the *sole and exclusive purpose* as a way or means of reaching

the top of the wheelhouse or flume, in order that the flume could be operated and regulated. So far as the evidence reveals throughout the case, the ladder was used solely as a means of ascent to the flume and descent therefrom to the ground. At the bottom of the ladder there was a walk, made of three pieces of 4x8 timber, which led to a tramway seven feet and two inches distant from the bottom of the ladder (p. 130). This tramway ran parallel to the flume.

The plaintiff testified (p. 22) that Mr. Patching told him to go up on the ladder and get a rope and a peavey to loosen the boards. Plaintiff did so and worked at this task until around four o'clock in the afternoon. He ascended the ladder, pried off the boards on top and then lowered them one by one to the ground (p. 43). He took some boards off the lower flume (p. 89) and did not have to climb the ladder to get them off (p. 90). In the case of each board he descended the ladder, removed the rope and reascended to lower another board, with the exception of those removed from the lower flume. The plaintiff testified that he had been up and down the ladder at least three times. Patching testified that he must have been up and down the ladder at least seven times (p. 113) from the number of boards that had been removed from the flume. The plaintiff testified that as he was making the last of these descents, and while he had his feet on or about the fourth rung from the top of the ladder, the top rung upon which his right hand rested pulled out, and that he fell backwards to the ground, striking the

edge of the tramway. It is for the injuries thus sustained that plaintiff sues. No bones were broken or sprains suffered, but the plaintiff testified that there were visible bruises on his back, and Dr. Mustard also testified that there was a bruise or contusion about the size of a dollar near the lower part of the spine. At the time plaintiff fell he had no load and the use of his arms and legs in descending the ladder was unimpeded.

Plaintiff testified that he was very nearly paralyzed by the fall and could not use an arm or his legs, and (p. 28):

> "I hurt so bad that I don't think a man could hurt any worse,—I don't see how he could.
>
> "Q. Did you suffer much pain?
>
> "A. Indeed I did."

Although plaintiff testified that he was suffering intense pain from the fall, the evidence shows he was able to call for help and that other persons working there were attracted by his call.

The evidence of plaintiff as to the condition of the ladder was given by plaintiff himself, in which he said (p. 42) that he noticed a little board, a rung from the ladder, was lying there after he fell to the ground; that the board was lying there and the nails were out and that on one side he could see rotten wood between the spikes—pieces of rotten wood there. He pointed out the defect to Mr. Orton after he had fallen (p. 90). He pointed up to it and showed Mr. Orton the cleat. The testimony shows that the plaintiff retained a clear recollection of practically

everything that was said and done after he regained his senses following the fall.

Patching, the superintendent, testified that the ladder was twenty-five feet high; that it had been built there eight or nine years prior to the accident; that it was constructed of native spruce; that native Alaska spruce should last for ten years without decaying (not that it would last that length of time); that the ladder in the same place and which the present ladder replaced had been torn down after five or six years because it was no longer fit for use (p. 117); and that present ladder was there at least three years longer. Patching also testified (p. 96) that he went up the ladder the same day from bottom to top and put his weight on each rung not observing any defect in the ladder; that he weighed 220 pounds. The foregoing constitutes all the evidence of any inspection made by the defendant and Patching stated (p. 120):

"Q. What did you go up there for?

"A. To see where was the best chance to get some planks to fix the fence."

Patching also testified that the reason he did not bring into court the portion of the upright which was also claimed to have been defective and rotten was that he thought the rung would prove the condition of the ladder (pp. 118–119).

Plaintiff testified that after the injury he remained at the hatchery for about six weeks; that at first he had to drink through a straw; that in turning him over in bed they had to turn him with a blanket;

that he had no control over his bladder; that they had to use a syringe on him for his bowels; that he had been obliged to use crutches ever since; that at the time of the injury there were bruises on his hips and bruises a long time afterwards on his back; that afterwards and up to the trial he had no appetite, could not sleep and suffered intense pain from the region of his back down; that he was sent by the superintendent of defendant to their doctor, Dr. Ellis; that the doctor never examined him very carefully and treated him for rheumatism; that plaintiff did not discontinue treating with Dr. Ellis until he was notified by Heckman, the general superintendent, that Dr. Ellis said, "There was nothing wrong with you," and he guessed they could not do any more for him (p. 33), at the same time stating he would send Gover below if he would sign up; that thereafter Gover had another talk with Heckman, in which Heckman made the same statement; that thereupon Gover sought another doctor, Dr. Mustard, a practitioner of twenty years, as against six years of practice by Dr. Ellis. Dr. Mustard testified that at the time of the trial (p. 68) the contusion, bruise, which I spoke of was still marked by a round brownish pigmented area the size of perhaps a dollar; a tenderness between the eleventh and twelfth dorsal vertebrae was still quite marked; the large muscles of the buttocks on the right side, the gluteus muscles, were very, very much wasted, shrunken and destroyed, so that it was apparent to an ordinary eye; that the reflexes which, upon first examination

of patient early in the year, were very exaggerated, were now absent altogether; that this condition could have been caused by an interference with the nerve supply of the muscle and by an injury to the spinal cord (p. 68); that at the time of the trial, in the lumbar region of the back downward posteriorly, there was altered sensation; the skin is sensitive to touch but insensitive to pain; it is also insensitive to differences in temperature; Gover could not tell whether an object that you touched him with was hot or cold; he could be burned in most of the portions of that section and he would not know it; that he had made these tests a day or two before; that he was prepared to make them in court and before the jury (p. 69); that all of the conditions found in the patient, in the opinion of the doctor, were caused by a lesion of the spinal cord producing degenerative changes in it; that the prospects of improvement in the patient were practically null; that there is a center in the spinal cord in the sacral region of the spinal cord, where the spinal cord control of the bladder and bowels is located, and that an accident to that would cause serious conditions in the control of those organs (pp. 69–70); that the only symptom discovered in the patient of rheumatism was the pain that he suffered in the back, but that rheumatism or lumbago would not affect the degenerative condition of the nerves which the doctor had described. Dr. Mustard also testified, on cross-examination, that it would be unlikely a man would fall the distance that plaintiff fell and not break any

bones, but that it was entirely possible. The doctor's testimony as to the condition of plaintiff was based, not on hypothetical questions, as stated by defendant in his brief on page 8 thereof, but upon positive signs and conditions which he detected in the plaintiff and which he testified could not have been feigned. Such signs and symptoms have been described in this paragraph in discussing the doctor's testimony.

Testimony showed that the plaintiff was a man at the time of the injury sixty-eight years old; that he had been earning the sum of approximately $5.00 a day while working for defendant; that he had lost about two days in the past nine months; that about one year before he started to work for the defendant, he had been prospecting in the hills in Alaska; that he was very strong and rugged and enjoying almost perfect health; that shortly before he went to work for defendant, he had walked twenty miles in one stretch, carrying a fifty-pound pack upon his back, and had made the trip at the rate of four miles per hour.

II.

THE DISTRICT COURT ERRED IN REFUSING TO GRANT THE REQUEST OF DEFENDANT FOR AN INSTRUCTED VERDICT (page 186), FOR THE REASON THAT THE LADDER WAS A SIMPLE TOOL, AND THE DANGERS GROWING OUT OF DEFECTS THEREIN, IF ANY, WERE ASSUMED BY THE EMPLOYEE.

In the brief for defendant, apparently the only

point relied upon for a complete reversal is as stated above. In answering defendant's brief I shall direct my brief only to the points raised in the brief of defendant, because it is practically admitted by defendant that the only error, if any there was, was committed with regard to the points raised in their brief.

Counsel for defendant, in support of the point that the ladder in this case falls within the simple tool doctrine, have cited nine cases. I shall take them up separately and point out wherein plaintiff contends they are not applicable in the case at bar. The cases cited by defendant tend to hold that in certain cases a ladder comes within the simple tool doctrine, but even in most of the cases the circumstances surrounding the ladder causing the injury are gone into by the courts and the courts indicate, at least inferentially, that the decisions may have been different had the circumstances surrounding the ladder been otherwise. Fortunately for plaintiff, the ladder upon which he claims to have been injured does not come within the classification of a simple tool or appliance. I shall deal with that point later on in this brief.

(1) *Cahill v. Hilton,* 13 N. E. 339. In this case the decision of the lower Court was reversed, the Court stating, however, in its opinion:

> "We do not, however, care to rest the decision in this case upon this proposition, as we are, after careful consideration of the whole evidence, of the opinion that the ladder was not instru-

> mental in producing the accident and even if it were, the mode and time of its use were not attributable to defendant."

This ladder was a simple device, about twelve feet high, and on page 343 of the same case the Court remarked:

> "They not only did not furnish ladder for the use in which it was employed, but the accident was not attributable to the use of the ladder."

(2) *Nosal v. International Harvester Co.,* 187 Ill. App. 411. In this case we find no facts bearing on the nature of the ladder and the circumstances connected therewith. Surely, if the facts in this case were similar to the facts in the case of *Pacific Telephone and Telegraph Co. v. Starr,* decided by this Court, counsel for defendant would not seriously contend that the doctrine announced in the Nosal case would be the law in this jurisdiction.

(3) *Sivley v. Nixon Mining Drill Co.,* 164 S. W. 772. When it is observed from the extract of that case quoted by counsel for defendant in their brief that the Court used the term "that an ordinary ladder falls within the class of simple tools in respect to a defect in which the employer is held not liable," it indicates that it is not every ladder that falls within the doctrine contended for by defendant, and this case cites the case of *Rut v. True Tag Paint Co.,* 69 S. W. 324, which held the master liable because a ladder had been attempted to be repaired and that, owing to the manner in which it had been repaired, plaintiff was misled and injured. This shows that even in cases of an ordinary and simple

ladder the Courts have often made exceptions in following what counsel for defendant contend is the general rule, and the Sivley case also refers to the case of *Jones v. Pacific Mills Co.,* 57 N. E. 663, in which case the Court held that whether the defects in the ladder were obvious, open, etc., were questions for the jury. The Sivley case also cites the case of *MacDonald v. Lovell,* 82 N. E. 955, and held that in a case where the plaintiff was injured by the ladder slipping, this was a risk that was obvious and apparent to the plaintiff and was assumed by him, and stated in the case that the ladder was sound and suitable for the purpose for which it was used, indicating that perhaps its decision may have been otherwise had the ladder not been sound and suitable for the purpose indicated.

(4) *Christy v. Southwestern Missouri Ry. Co.,* 110 S. W. 694. In this case the plaintiff was held to have assumed the risk because he knew of the condition of the ladder, which was old, scarred and weak, holding that *that* the plaintiff used the ladder knowing its condition.

(5) *McKay v. Hand,* 47 N. E. 104. This case also shows that the Court took into consideration the fact that there was no evidence to show that the ladder was rotten or cross-grained, not indicating, of course, what its decision would have been had there been evidence of that nature.

(6) *McGill v. Cleveland etc. Co.,* 86 N. E. 989. This case held that where the plaintiff knew of the defects in an *ordinary* step-ladder, about seven feet high, and continued to use it, he assumed the risk,

even though the master had promised to furnish a new ladder. There is a broad distinction between an *ordinary step-ladder* and the one in case at bar, especially where the plaintiff did not know of the defect.

(7) *Blundell v. Wm. A. Miller Elevator Mfg. Co.,* 88 S. W. 103. In this case plaintiff was injured while using a ladder about twelve feet high. The ladder slipped. The Court held this a simple appliance and that plaintiff assumed the risk, but, like a good many other cases referred to above, the Court states there was no evidence tending to show that the ladder was not sound and also held in deciding the case that there was no evidence to show that the ladder was furnished by the defendant.

(8) *McNamara v. Macdonough,* 102 Cal. 575. In this case plaintiff was injured while working on a scaffold and the verdict was sustained on appeal. In this case the instruction given by the lower Court was approved by the Supreme Court and simply amounts to this—that a person who works upon a scaffold with knowledge or means of knowledge of any defects therein assumes the risk. This would be true in any case, but the means of knowledge of the defect and the means of obtaining such knowledge would be different, depending upon the experience, etc., of the person employed.

Thus, by referring to the above cases, it is observed that in every case the ladder was in fact a most simple appliance, notwithstanding which the Courts have intimated, inferentially at least, that the decisions in some may have been different had there

been testimony to show that the ladder was not sound or suitable. Even counsel for defendant concede that not every ladder falls within the rule they contend applies in this case, and this is shown by their anticipation of the citation by plaintiff of the case of *Pacific Telephone & Telegraph Co. v. Starr,* 206 Fed. 157 (decision by this Court). Counsel have shown extreme shrewdness in citing this case in their brief, because it is possible it may not come with the same amount of force as if it had been referred to for the first time in the brief of plaintiff. It is also easily apparent that counsel greatly fear the force of this case.

Plaintiff contends that the Starr case, taken in its strongest aspect, is no stronger than the case at bar. In that case an extension ladder was used and the plaintiff was about twenty or twenty-five feet from the ground when the injury occurred. Also in that case the ladder was a portable ladder, one which could have been viewed from all sides and angles. In the case at bar the ladder causing the injury was twenty-five feet high, was vertical and was nailed solidly to the wheelhouse or flume. It was, in fact, a part of the structure, for it could not have been used for anything other than the purpose for which plaintiff used it when injured. It could not have been removed to other places of the defendant's property and used for any other purpose. It surely was not a ladder of the *ordinary* kind, such as a *step-ladder* and *short contrivances used about the house.* It was an extremely dangerous instrumentality on account of its height from the ground. It is true that it

was not an extension ladder, as in the Starr case, *supra,* but it was equally as dangerous and complex a ladder as that in the Starr case. Counsel have endeavored to show that this court based its decision in the Starr case upon the nature of the work in which the plaintiff was engaged and that therefore the case at bar does not come within the doctrine announced; but it is observed that the plaintiff in the Starr case fell a distance of between twenty and twenty-five feet. How do counsel escape the fact that the nature of the work required in the case at bar caused the plaintiff to ascend a distance of over twenty-five feet and that the nature of the work, to wit, taking down the boards, required plaintiff to ascend to an even greater height than in the Starr case at the time of the injury? There is absolutely no distinction in the Starr case and the case at bar, unless it is that the case at bar is a stronger one on account of the circumstances surrounding the ladder, and the conclusion is almost irresistible that the ladder in the case at bar is not only not a simple tool or appliance, as contended for by counsel for defendant, but is an instrumentality just as complex and dangerous and unusual as the ladder in the Starr case. It should be noted in this connection also that the danger of an injury from the ladder in the case at bar is even greater than in the Starr case, because one falling as plaintiff did could not possibly have the same opportunity to catch himself, because of the fact that the ladder is straight up and down and the law of gravity would throw him out and away from the ladder, while in the Starr case the ladder was placed

against a building and a person falling would have much more opportunity to save himself from injury because in falling he would not leave the ladder so suddenly as if it were perpendicular.

However, regardless of what view this Court takes of the above proposition, still the cases cited by defendant and referred to herein cannot possibly have any application to the case at bar. The reason is this—the ladder in this case was a ladder in name only. Its true purpose was to afford a means of getting up to the top of the flume in order to regulate the flow of water therein and then to descend to the ground. It was no less a means of egress and ingress than if the flume in question had been located on level ground and the ladder had also been placed on the ground and used as a walk to reach the flume. It was simply the means by which a person could get from one point (on the ground) to another (top of the wheelhouse or flume). As stated, had the ladder been used as a walk and located on the ground in order to reach the flume, would counsel contend or would this Court hold that it was a ladder and a simple appliance? If not, then it is still a greater reason to hold that it is not in fact a ladder and therefore a simple appliance, where it has been used, as in this case, as a medium to reach the flume from the ground,—for, regardless of anything that appears in the record, that was the sole and exclusive purpose of the ladder. It thus appears that the term "ladder" has been a misnomer because, as shown above, its purpose was never that of an ordinary ladder and although the Court at the trial of

this case referred to the subject as a ladder, still in its instructions (p. 97) the Court had in mind the true purpose of the ladder in this case and instructed the jury as follows:

> "It is the duty of the master to use ordinary care, the care of an ordinarily prudent person, to see that the appliances furnished the employee wherewith to do the work required of him are reasonably safe and adapted to the work, and *it is the duty of the master to use reasonable care—ordinary care—to see that the place where the work is to be done is reasonably safe and that the way of getting to the work or of leaving the work is reasonably safe.*"

Of course, inasmuch as the ladder in this case could not be termed a walk, for the reason it was not located on the ground, there could be but one other definition and that is, that in fact and in purpose it was used in lieu of a stair.

*O'Brien v. Northwestern Consolidated Milling Co.,* 137 N. W. 399. In this case plaintiff was injured by the breaking of the top round in a short ladder that was used in lieu of the stair to go from one floor to another. In the O'Brien case it was urged that the ladder causing the injury was a simple tool. The Court held (p. 401):

> "We hold that the rule suggested does not apply to the instant case and that the authorities relied upon by the defendant are not in point. Considering the long-continued absolute and exclusive use of this ladder as a means of ingress to the packing-room, it must be taken

for all practical and legal purposes as the equivalent of a stair. Plainly the defendant cannot justly complain if the ladder which it installed in lieu of a stair be held to be a stair, in contemplation of the law, with the same resultant duty on the part of the defendant to maintain and keep it safe, as though it were in fact a stair.

"The instruction challenged was, therefore, correct, and it was a question for the jury under the circumstances described whether the defendant used ordinary care in furnishing the plaintiff with a reasonably safe place to work, the ladder, when considered as a stair, being properly termed to be the nature of such place."

*Pacific Telephone & Telegraph Co. v. Starr,* 206 Fed. 157. This case is practically decisive of the case at bar.

*Pendergrass v. St. Louis & S. F. R. Co.,* 162 S. W. 712. This case is a very strong one in support of plaintiff's case. The plaintiff therein was injured by the breaking of a rung in a ladder which was used as a means of ingress and egress from the ground floor to the pit, wherein was installed the pump and boiler. The ladder was about ten or twelve feet high. In this case plaintiff's duties were ordinarily performed above the ground and not in the pit, but it was necessary for him at times, sometimes several times a day, to descend into the pit and look after matters pertaining to the machinery located therein. It was contended in this case (p. 715) that:

"plaintiff used the ladder quite a number of times during the period in question; that it was a simple appliance and that he knew its condition even better than the master, and must be held to have assumed the risk therefrom. This contention is without merit, however, for the reason that the ladder was *a part of the premises upon and about which plaintiff was required to work. It was the only method provided for ingress and egress to and from the pit into which it was necessary for him to go from time to time.* He had been employed at the place about six days and it cannot be said that he knew the condition of the premises or that he assumed the risks of any dangers that might lurk therein which were not so obvious as to deter a man of ordinary prudence from using the same. It was the master's duty to exercise ordinary care to furnish him a reasonably safe place to work, which included a reasonably safe means of descending to the machinery in the pit.

"*And the ladder was not a common tool or in fact in this case a tool at all in the proper sense of that term but a fixed part of the premises upon and about which the plaintiff was required to work,* and whatever may be said as to the rule regarding the duty of the master to inspect appliances in the nature of common tools of everyday use, the rule would clearly have no application here.

"It is said that the defect in the ladder, if any, was a latent one which could not have been dis-

covered by the exercise of ordinary care on the part of the master and that therefore there can be no recovery, but we think that there was sufficient evidence to take to the jury the question of whether the master had properly discharged its duty toward the servant to exercise reasonable care to provide the latter with a reasonably safe place to work. It appears that this ladder had been in use for a number of years. Defendant's foreman of the bridge and building department testified that it was there when he took charge of this department, nearly four years before the accident. The pump repairer thought that it had been there as long as he had had anything to do with this station, which was four or five years. No witness could say when it had been installed. There was no evidence of any repairs ever having been made upon it, nor was there any evidence that it had ever been inspected in a way which would have revealed any defects or insufficiencies therein. It is true that defendant's foreman of the bridge and building department testified that he knew that a month before the accident he was in the pit and examined the ladder and the premises generally, as was his custom, but it quite clearly appears that this examination was a very superficial one. There was testimony to the effect that the ladder was so covered with dirt and grease that one looking at it by the light of a torch, as did this witness, could see but little if anything more than the fact that it had remained intact. This

witness merely said that when he was in the pit he 'looked at the ladder' and said: 'I am always looking for defects; I examined the ladder when I was there and went up and down it; I had a torch.' This was the only evidence relating to any inspection of this ladder at any time prior to the accident. The duty resting upon the master in such cases to inspect and make such examinations and tests at reasonable intervals as may be reasonably necessary to ascertain the condition of the place or instrumentality in question is an affirmative and continuing duty. 'It will not do to say that, having furnished suitable and proper machinery for the plant, the master can thereafter remain passive so long as they work well and seem safe. The duty of inspection is affirmative and must be fulfilled and positively performed. Anything short of this would not be ordinary care.'

"And relative to the performance of the master's duty to inspect, our Supreme Court, *Gutridge vs. Ry.,* 105 Mo. 520, said: 'We quote these authorities to show that the master is not always, and under all circumstances, excused if he could not see a defect. And if the conditions are such as would excite suspicion in a man of ordinary prudence he must go further and apply other tests. . . . What the ordinary tests as applied to railroad appliances are are not disclosed by this record; but we feel satisfied that looking is not the only test. The master must

use such reasonable tests to discover defects as ordinary prudence suggests.'

"And in *Labatt on Master and Servant* it is said: 'In view of the natural tendencies of an inorganic instrumentality to become less and less safe the longer it is used, the court will not set aside a verdict for the servant which is based upon the theory that the failure to inspect it was culpable where the evidence shows that it had been a part of the master's plant for such a period that, taking into account the nature of the materials of which it was composed, the functions which it was performing, and the various influences to which it was exposed by climatic changes or physical forces, it is not an unreasonable inference that a prudent man would have examined it for the purpose of ascertaining what its actual condition was.' "

This case, it seems, is exactly in point with the case at bar. The ladder was used in going from the ground up instead of going from the ground down and there can be no material difference on account of that fact. The outstanding point is that *the ladder was used as a means of ingress and egress to and from the ground floor to the pit where the work was to have been performed. In the case at bar the ladder causing plaintiff's injury was used solely and exclusively for the same purpose, to wit, affording a means of getting to the flume and then descending to the ground.* Also in the Pendergass case, *supra,* the ladder was not exposed to the elements, it was inside the building. What makes the case at bar

stronger is—the ladder was exposed to all the elements, rain, snow, heat, frost, etc. The ladder in the Pendergass case was about four or five years old—in the case at bar the undisputed testimony shows it was eight or nine years old and according to Patching's testimony should last ten years (not that it would). In the Pendergass case an actual inspection had been made by using a torch. In the case at bar no inspection had been made other than that Patching testified he went up the ladder to see where he could get some plank to fix the fence. He nowhere testified that he made an inspection. Furthermore, actionable and culpable negligence is shown by Patching when he states he did not know when he had ever been up the ladder before and could not even give any estimate of the time. It must be quite convincing to this Court that the only reason Patching went up the ladder on the day of the accident was to find out where he could get plank to fix the fence,—and not to make any inspection whatever, as claimed by defendant. But even assuming that which Patching did constituted any inspection, it surely was a question for the jury to decide under the circumstances whether Patching actually did go up the ladder as he claimed and whether or not his act described by him was a sufficient and proper inspection.

*Twombly v. Consolidated Electric Light Co.,* 64 L. R. A. 551. Plaintiff was injured by falling about twenty-five feet from a ladder, a rung of which broke while plaintiff was working thereon. It was urged, as in the case at bar, that the ladder was a simple tool. The Court said (p. 553):

"But it is contended as a matter of law that the defendant is not liable under the evidence. It is urged that there is no duty resting on the master to inspect, during their use, those common tools and appliances with which everyone is conversant; that if they wear out and become defective the employer may rely upon the presumption that those using them will first detect the defect; and that the employer is not to be held for negligence when the tool is a common one, of the fitness of which the servant is as competent to judge as the master. . . . But it seems to us that a forty-foot extension ladder is not a common tool or appliance within the meaning of those rules. A defect in the ladder arising from age or decay which might not be discoverable by such inspection as a workman is expected to make, might be upon more careful inspection. . . . but that is not this case. The plaintiff was under no special duty to inspect or repair this ladder except as a rainy-day work in common with his fellow-laborers when he might be directed specially to do so."

*Mo. K & T. Ry. of Texas v. Steele,* 110 S. W. 171.

In this case the Court held:

"Where defendant provided a ladder by which its servant was expected to reach one of the manhead doors in the rear of the boilers of defendant's plant, such ladder constitutes a 'place' within the rule requiring a master to furnish his servant with a reasonably safe place."

It is so apparent in the case at bar that the ladder in question was not a simple tool or appliance as contended for by counsel for defendant that it is useless in our judgment to cite further authorities on that point.

Counsel next contend that plaintiff must be held to have assumed the risk because he qualified as an expert on the duration and usefulness of spruce wood and that he could have observed the rotten condition and defect in the ladder, if any there was. The evidence does not show that plaintiff testified as an expert in this regard. He simply stated (p. 86) that he had had *some* experience with timber during his life and that native timber standing exposed to the elements for twenty or fifteen years would be likely to decay, but just preceding this plaintiff had positively testified that he could not tell the age of timber and that he did not know the age of this particular ladder at the time he ascended it and that the superintendent had not told him the age. He also stated that "he did not observe any defect in the ladder at that time, that he thought it was just like the other things around there, that it was all right because he took it that the superintendent would not have sent him up there unless it was, and that he went up the ladder just the same as he came up the stairs here, or anything like that," and when asked why he did not stop work and make a careful inspection of the ladder, he said, "I wasn't told to do that, I just followed Mr. Patching's instructions." Furthermore (p. 25), plaintiff testified that Mr. Patching did not instruct him to take

down the ladder or any portion of the wheelhouse, but that he carefully instructed him (pp. 25–26): "Be careful; don't hurt the flume because we want to use that still," and in this connection the evidence shows that defendant could have detected the condition of the ladder had they made a special inspection and also by tapping the ladder with a mallet.

Along this same line, counsel for defendant said in their brief (p. 17):

> "Plaintiff claims that his right hand only was on the rung which pulled off. Where was the left hand? His feet were firmly placed upon the fourth rung and did not slip. The slightest attention to his movements must have protected plaintiff, as a child of tender years would have been perfectly able to grasp the rung or the side of the upright instead of this alleged defective rung."

It is apparent that counsel have very little knowledge of a ladder or they would not make this statement. It is common knowledge that in ascending or descending a ladder a person holds onto one rung with one hand and then goes up or down, whichever the case may be, moving his hands and feet accordingly. If he did not take either hand off he would never move. In this case, plaintiff's left hand was moving down to get another hold. This left but one hand on the rung which broke and which naturally had thereon a greater strain. After removing his left hand, the added strain caused the top rung to pull out. The law of gravity would naturally throw the plaintiff away from the ladder; therefore how

could he have protected himself from a fall? Had it been a slanting ladder, as was used in practically all the cases cited by counsel for defendant, plaintiff would have had an opportunity to grasp the ladder in falling, but not with a vertical ladder such as this, and furthermore, plaintiff could not have taken ahold of the upright for the very good reason given by Mr. Patching, their witness, in endeavoring to show that he placed his hand on every rung of the ladder, when he said on cross-examination that he could not take ahold of the upright unless he pinched it with his fingers, because it was nailed solidly to the building. Thus it is seen that the very argument endeavored to be used by counsel for defendant is a strong point in favor of plaintiff. It shows clearly that the ladder in the case at bar was not a simple appliance.

Counsel further contend that if the defect were latent, under the ruling in the Starr case there could have been no liability. What is there to show the defect was latent? The testimony of plaintiff is that the rung was rotten, that the upright was decayed and defective, that this could have been discovered by making what he termed a special inspection, or by tapping the ladder with a mallet, and in this connection it is well to note that the evidence shows that the defective portion of the ladder was in the upright and the rung at the very end. It is not reasonable to think that a man going about his work using the ladder would look on the side of the ladder, perhaps, to ascertain if it were safe, but it is reasonable to assume that an inspection would

have revealed this rotten and decayed condition at the end of the rung and on the side of the upright. Under this evidence, and even in the absence of this evidence, with regard to the inspection, the evidence of plaintiff to the effect that the upright and rung on the ladder were decayed and rotten would have been sufficient to make a case for the jury. Plaintiff's evidence, taken together with all the facts, that the ladder was eight or nine years old; that the ladder in the same place before this one was removed was also taken down when it was five or six years old, because, as Patching testified, it was no longer fit for use; that the ladder was exposed to the elements and that Patching went up the ladder the same day of the accident—to find out where he could get some plank to fix the fence with (not to make an inspection)—and that he must have put his hand on each rung, because otherwise he could not have gone up, make out an exceedingly strong case, which was properly submitted to the jury, as to whether or not defendant used reasonable care in providing plaintiff a safe place to work and more particularly a reasonably safe means of getting to the work and returning therefrom, just as the Court instructed as shown on page 197, and as to whether any inspection was required and if so, whether the one claimed to have been made by defendant was proper under the circumstances, etc.

The principle discussed above is almost fundamental and requires no citation of authority. The general rule is, as stated in Labatt's *Master and Servant,* Vol. III, p. 2815:

"Whether or not the duty of the master with regard to proper inspection has been performed by the application of any given test is to be determined by considering whether that test will give indication as to the actual condition of the instrumentality in question. In the application of this principle the courts have usually proceeded upon the theory that a merely visual or ocular inspection of external conditions does not satisfy the full measure of the master's obligations, where the servant's safety depends upon the soundness of the material of which an instrumentality is composed, or upon the firmness with which the separate parts of an instrumentality are attached to each other."

The question of whether the examination to which the instrumentality which caused the injury was actually subjected before the accident was such as to satisfy the standard is primarily one for the jury.

III.

THE JUDGMENT IN THIS CASE SHOULD BE REVERSED UPON THE GROUND THAT THE VERDICT OF THE JURY WAS EXCESSIVE.

Under this heading, counsel do not cite any authorities to show that the verdict is excessive. If the testimony given by plaintiff and the doctor, who testified in his behalf, is true, and it must be taken as true, then the amount of the verdict is not excessive, when it is taken into consideration the permanency of the injuries and the pain and suffering undergone by plaintiff. The jury saw the condition

of plaintiff at the trial and under proper instructions of the court assessed the damages. There is not a scintilla of evidence to show that the jury was influenced by passion or prejudice against the company. This Court can easily perceive that the record in this case is very clear and deals strictly with the facts. There was no attempt shown to create any prejudice against defendant and in this connection it is perhaps pertinent to note the actions adopted by counsel for defendant at the trial. When counsel for defendant cross-examined plaintiff, he asked him if he had not told witnesses Patching and Peterson, who were witnesses for defendant, that he, plaintiff, had been smashed up in an accident before this injury, and then by reading Patching's and Peterson's testimony when they took the stand, the record showed that counsel never asked them if plaintiff made such statements. It is noted that plaintiff flatly denied that he had ever been injured before, or made such statements. If the jury took those facts into consideration, then surely defendant cannot now complain.

In the case of Pendergass, *supra* (p. 719), it was urged that the verdict therein was excessive. The Court held:

> "In view of the testimony to which we have alluded before, it is altogether clear that we would not be justified in declaring the verdict excessive. There is ample evidence to support a recovery to the amount of the verdict and whether plaintiff was exaggerating the extent of his injuries and was less injured than he pro-

fesses to be, as appellant seems to think, was a question to be considered and determined by the jury.

The verdict of the jury is not excessive. 13 Cyc. 129:

> "In case of injuries to the nervous system a verdict will rarely be considered excessive. So in injuries to the spine that have resulted from a personal injury, the Court is little inclined to interfere with a verdict on the ground that it is excessive."

13 Cyc. 131:

> "The Courts have gone so far as to refuse interference on the ground of excessive damages, not only where there is a probability of permanent injury, but where the evidence shows a possibility exists."

For the reasons stated herein, there was no error, and the verdict should be affirmed.

Dated at San Francisco, Cal., Oct. 12, 1921.

Respectfully submitted,

A. H. ZIEGLER,

Attorney for Defendant in Error.